

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FCC 03M-58
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In the Matter of) EB Docket No. 03-85
)
BUSINESS OPTIONS, INC.) File No. EB-02-TC-151
)
Order to Show Cause and Notice of) NAL/Acct. No. 200332170002
Opportunity for Hearing) FRN: 0007179054
)

MEMORANDUM OPINION AND ORDER

Issued: December 23, 2003

Released: December 24, 2003

PRELIMINARY STATEMENT

1. This is a ruling on Enforcement Bureau's Motion for Partial Summary Decision filed by the Enforcement Bureau ("Bureau") on December 2, 2003. Opposition to the Enforcement Bureau's Motion for Partial Summary Decision was due to be filed by Business Options, Inc. (BOI) on December 16, 2003. No Opposition has been filed and BOI has defaulted on the Bureau's Motion.¹

2. This case concerns "slamming" by BOI,² a reseller of long distance telephone service. "Slamming" involves the submission or execution of an unauthorized change in a subscriber's selection of a provider of telecommunications service. See U.S.C. § 258, 47 C.F.R. §§ 64.1100, 1120, 1130, 1140, and § 64.1195. The Bureau's Motion does not request rulings on the disqualifying issue of whether BOI has made misrepresentations or engaged in a lack of candor. Nor does the Bureau request rulings on remedies of revocation, cease and desist, or forfeiture.

¹ On November 18, 2003, BOI filed an Opposition that responded to an earlier Motion for Partial Summary Decision relating to Issues (b), (c), and (d). See *Memorandum Opinion and Order*, FCC 03M-54, released December 9, 2003. The representations of BOI in that Opposition as applied in FCC 03M-54, constitute admissions and shall apply to this ruling in favor of the Bureau.

² BOI is identified for purposes of this ruling as including BOI, Buzz Telecom Corp., U.S. Bell, Inc., and/or Link Technologies.

3. The designation order in this case specifies the following issues:

- (a) to determine whether Business Options, Inc. made misrepresentations or engaged in lack of candor;
- (b) to determine whether Business Options, Inc. changed consumers' preferred carrier without their authorization in willful or repeated violation of § 258 of the Act and §§ 64.1100-1190 of the Commission's rules;
- (c) to determine whether Business Options, Inc. failed to file Form FCC 499-A in willful or repeated violation of § 64.1195 of the Commission's rules;
- (d) to determine whether Business Options, Inc. discontinued service without Commission authorization in willful or repeated violation of § 214 of the Act and §§ 63.71 and 63.505 of the Commission's rules;
- (e) to determine, in light of all the foregoing, whether Business Options, Inc.'s authorization pursuant to § 214 of the Act to operate as a common carrier should be revoked;
- (f) to determine whether, in light of all the foregoing, Business Options, Inc., and/or its principals should be ordered to cease and desist from the provision of any interstate common carrier services without the prior consent of the Commission.

Order to Show Cause and Notice of Opportunity for Hearing ("OSC") MM 3566 at Para. 9, released April 4, 1986, 51 Fed. Reg. 22,865 (June 23, 1986).

4. On October 27, 2003, the Bureau filed an earlier Motion for Partial Summary Decision requesting interlocutory rulings on issues (b), (c), and (d) which was granted. *See Memorandum Opinion and Order* FCC 03M-54, released December 9, 2003.

5. By post-designation ruling, the following additional issues were added:

- (g) to determine whether Business Options, Inc., Buzz Telecom Corp., U.S. Bell, Inc. and/or Link Technologies failed to make required contributions to universal service support programs, in violation of § 254(d) of the Communications Act of 1934, as

amended, 47 U.S.C. § 254(d), and § 54.706 of the Commission's rules, 47 C.F.R. § 54.706;

- (h) to determine whether Business Options, Inc., Buzz Telecom Corp., U.S. Bell Inc. and/or Link Technologies failed to make required contributions to the Telecommunications Relay Services Fund, in violation of § 64.604(c)(5)(iii)(A) of the Commission's rules, 47 C.F.R. § 64.604(c)(5)(iii)(A);
- (i) to determine whether Business Options, Inc., Buzz Telecom Corp., U.S. Bell Inc. and/or Link Technologies failed to file Telecommunications Reporting Worksheets, in violation of §§ 54.711, 54.713, and 64.604(i) of the Commission's rules, 47 C.F.R. §§ 54.711, 54.713, 64.604(c)(iii)(B);
- (j) to determine whether an Order for Forfeiture should be issued pursuant to § 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), against Business Options, Inc., Buzz Telecom Corp., U.S. Bell, Inc. and/or Link Technologies [for] failure to make the required universal service contributions in a timely manner, in violation of § 254(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 54(d) and § 54.706 of the Commission's Rules, 47 C.F.R. § 54.706; \$10,000 for each failure to file the required Forms 499 in a timely manner, in violation of §§ 54.711, 54.713, 64.604(c)(5)(iii)(B) of the Commission's Rules, 47 C.F.R. §§ 54.711, 54.713, 64.604(c)(5)(iii)(B); and (c) \$10,000 for each failure to file required contributions to the Telecommunications Relay Services Fund, in violation of § 64.604(c)(5)(iii)(A) of the Commission's Rules, 47 C.F.R. § 64.604(c)(5)(iii)(A).

See Memorandum Opinion and Order, FCC 03M-33, released on August 20, 2003. The Bureau now requests that issues (g), (h), and (i) also be decided by summary decision. Since the Bureau does not seek summary decision on a disqualifying misrepresentation issue, or final resolution of the case by revocation, or a determination of the amount of any forfeiture, this ruling is limited to only an interlocutory partial summary decision on three non-dispositive issues.³

³ Commission rules authorize summary decision of "all or any" of the issues set for hearing. 47 C.F.R. § 1.251(a). The rules further provide that where only non-dispositive issues are decided, the Presiding Judge "will issue a memorandum opinion and order, interlocutory in character, and the hearing will proceed on the remaining issues." 47 C.F.R. § 1.251(e).

Standards for Summary Decision

6. The rules for determining the propriety of summary decision state:

The presiding officer may grant such motion if the pleadings, affidavits, material obtained by discovery or otherwise, admissions, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

Summary Decision Procedures, 34 F.C.C. 2d 485 (1972).

7. The rules further provide that in considering a motion for summary decision:

The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. § 1.251(a)(1).

8. There is discretion to use or not use summary procedures:

The presiding officer, giving appropriate weight to the nature of the proceeding, the issue or issues, the proof, and to the need for cross-examination, may grant a motion for summary decision to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions or matters officially noticed, show that there is no genuine issue as to any material fact and that a party is otherwise entitled to summary decision.

and

If it appears from the affidavits of a party opposing the motion that he cannot, for good cause shown, present by affidavit or otherwise facts essential to justify his opposition, the presiding officer may deny the motion, may order a continuance to permit affidavits to be obtained or discovery to be had, or make such other order as is just.

47 C.F.R. § 1.251(d).

9. The Commission has recognized that issues in a complex case (such as this one) are appropriate for summary decision, even though the case as a whole may not. *Summary Decision Procedures*, *supra* at 488. *Cf. Family Broadcasting, Inc.*, 17 F.C.C. Rcd 6180 (2002) (Commission partially affirms summary decision on violations specified in show cause order, but proposed transfer of control raised genuine issue of material fact that requires hearing). Summary decision can also be used procedurally as a “pretrial determination of what material facts do exist without substantial controversy and in good faith controverted.” *Summary Decision Procedures*, *supra* at 487–488. In this case, the Bureau has made use of BOI’s answers to interrogatories and requests to admit, and the Bureau supports its Motion with “material obtained by discovery.” 47 C.F.R. § 1.251(c).

Bureau’s Burden

10. The Bureau has the burden of establishing that summary decision would be appropriate based on its papers. *Summary Decision Procedures*, *supra* at 487–88 (1972). In order to sustain its burden, the Bureau must establish that the truth is clear, that the basic facts are undisputed, and that the parties are not in disagreement regarding factual inferences that may properly be drawn from such facts. *Id. See also Big Country Radio, Inc.*, 50 F.C.C. 2d 967–968 (Review Bd. 1975). The Bureau’s burden is met by its un rebutted supporting papers consisting to a large extent of party admissions. This case is appropriate for partial summary decision on the limited relief sought.

11. First, it is alleged that BOI “willfully and repeatedly” failed to make required contributions to universal service support programs in violation of § 254(d) of the Act, and § 54.706 of the Commission’s rules.

12. Second, it is alleged that BOI “willfully or repeatedly” failed to make required contributions to the Telecommunications Relay Services (“TRS”) Fund in violation of § 64.605(c)(5) of the Commission’s rules.

13. Third, it is alleged that BOI “willfully or repeatedly” failed to file Telecommunications Reporting Worksheets in violation of §§ 54.711, 54.713, and 64.404(i) of the Commission’s rules.

14. While the violations alleged in issues (g), (h), and (i) are established factually by reliable and substantial evidence, the Bureau does not request dispositive relief as to sanction (revocation, cease and desist, and/or forfeiture) by this partial summary decision.

BOI’s Position

15. The summary decision rule contemplates the consideration of opposing affidavits, and directs that “a party opposing the motion may not rest upon mere allegations or denial.” 47 C.F.R. § 1.251(d). BOI contends in this case that it “unintentionally violated the Commission’s rules.” In that regard, BOI acknowledges

that it made "mistakes" that were based on "lack of sophistication" and placed reliance on individuals "without telecommunications expertise or legal qualification" to contact Commission staff and to make Commission filings. However, BOI does not offer contrary or mitigating facts through counter affidavit(s). BOI merely focuses in its pleading on sanctions, argues that "there are material facts that remain open that directly bear on liability as a matter of law (and thus still must be litigated)," and states "we have not included affidavits in support of any contentions." After reviewing BOI's papers, it is concluded that BOI fails to raise any genuine issue of material fact, and it appears that BOI has not raised significant issues against findings and conclusions that are based on the substantive facts offered by the Bureau in support of its Motion.⁴

16. Even though BOI has not opposed the Bureau's Motion with pleadings or affidavit(s), the moving party's papers still must be "carefully scrutinized." *Summary Decision Procedures*, *supra* at 488. Partial summary decision will be granted because the violations are "willful" and "repeated" as a matter of law. However, additional proof is expected to be introduced by BOI on factual mitigating circumstances such as BOI's actual intentions, or the qualifications of BOI's agents who were dealing with the Commission at the time of the violations, and BOI's explanation for using those agents.

Willful and Repeated Violations

17. Issues (g), (h), and (i) were set by the Commission to determine whether the violations, if proven, were in "willful or repeated" violation of the Act or the Rules. The Act defines the term "willful" and the term "repeated" as follows:

- (1) The term "willful," when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act, or any rule or regulation of the Commission --- .⁵
- (2) The term "repeated --- means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

47 U.S.C. § 312(f).

⁴ The Bureau relies on facts that are established by discovery from BOI. Therefore, for the most part, BOI has first-hand knowledge of the evidence used in support of this ruling.

⁵ The Commission has held consistently in litigated cases that the term "willful" means that the violator knew that it was taking the action in question, irrespective of any intent to violate the Commission's rules. *Southern California Broadcasting Co.*, 6 F.C.C. Rcd 4387 (1991), *MCI Telecommunications Corp.*, 3 F.C.C. Rcd 509, 514 n.22 (1988), *Hale Broadcasting Corp.*, 79 F.C.C. Rcd 169, 171 (1980).

18. In this case, BOI admits to “technical violations,” but contests that its violations warrant revocation and/or any monetary forfeiture. That argument does not provide an affirmative defense because **BOI fails to show by affidavit or otherwise that it had not acted willfully or repeatedly with respect to its admitted “technical violations.”** Therefore, it must be concluded that BOI intended to perform the acts which were in violation of the Communications Act and Commission regulations with regard to: (1) failing to make contributions to universal support programs; (2) failing to make required contributions to the TRS Fund; and (3) failing to file required Worksheets regarding both contributions.

ANALYSIS AND DISCUSSION

Issue (g) Universal Service Fund

19. *Issue (g):* The Commission’s rules require all carriers that provide interstate telecommunications service to contribute to the federal universal service fund.⁶ Section 54.713 of the Commission’s rules warns that a carrier’s failure to submit its contributions “may subject the contributor to the enforcement provisions of the Act and any other applicable law.”⁷ The facts establish BOI as a reseller of interstate long-distance service. Therefore, BOI must contribute to the federal universal service fund. By document dated July 6, 2002, BOI’s co-owner, Mr. Kurtis Kintzel, acknowledged the company’s failure to pay any federal universal service. And BOI has not paid any federal universal service contributions since Mr. Kintzel’s acknowledgement.⁸ The un rebutted facts presented by the Bureau establish that BOI has repeatedly violated § 254(d) of the act and § 54.706 of the Commission’s rules by failing to make its universal service contributions. Accordingly, issue (g) is resolved against BOI.

Issue (h) Telecommunications Relay Services Fund

20. Section 64.604 of the Commission’s rules requires every carrier providing interstate telecommunications services to contribute to the interstate TRS Fund on the basis of interstate end-user telecommunications revenues. This rule specifically includes carriers (like BOI) that provide resale services. 47 C.F.R. § 64.604(c)(5)(iii)(A). Each carrier must contribute at least \$25 per year, and it follows that all carriers must at least

⁶ 47 C.F.R. § 54.706(b). *See also* 47 C.F.R. § 54.709 (describing method for determining carrier contributions to the universal service fund).

⁷ 47 C.F.R. § 54.7 13.

⁸ *See* 47 C.F.R. § 54.7 13.

make one annual contribution.⁹ BOI has acknowledged that it had not yet made any payments to the TRS fund as of October 14, 2003.¹⁰ The undisputed facts establish that BOI has repeatedly violated § 64.604(c)(5)(iii)(A) and (B). Accordingly, issue (h) is resolved against BOI.

Issue (i) Reporting Worksheets

21. Section 254(d) of the Act requires that interstate telecommunications carriers “contribute ... to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.”¹¹ In implementing section 254, the Commission authorized USAC to administer the universal service support mechanisms and to perform billing and collection functions.¹² USAC uses the Telecommunications Reporting Worksheet to calculate and bill for contributions.¹³ Before March 14, 2001, carriers were required to file Worksheets twice a year.¹⁴ Contributions are based upon the same Worksheet used for calculating universal service contributions.¹⁵ Beginning March 14, 2001, the Commission modified its reporting requirements to require carriers to file an Annual Worksheet, which covers revenues for the entire calendar year and is to be filed by the following April, as well as a Quarterly Worksheet, which covers interstate and international revenues accrued during the previous quarter.¹⁶

⁹ *Id.*

¹⁰ BOI’s Third Interrogatory Answers, p. 6, Response 8 (Attachment 5).

¹¹ 47 U.S.C. § 254(d).

¹² *See Amendment of Parts 54 and 69 -- Changes to the Board of Directors of the National Exchange Carriers Association, Inc.*, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400, 18415, ¶ 25 (1997); 47 C.F.R. § 54.702(b).

¹³ *See* 47 C.F.R. § 54.709.

¹⁴ *See Globcom, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, FCC 03-23 1 ¶ 4 & nn. 15-16, released September 30, 2003.

¹⁵ 47 C.F.R. § 64.604(c)(5)(iii)(B).

¹⁶ *See also* 47 C.F.R. § 54.711(a). As of April 1, 2003, USAC bases a carrier’s universal service obligation on the carrier’s projected collected revenue rather than its historical gross-billed revenue. *See Globcom, Inc.*, *supra* note 13, at n. 31.

22. BOI has been a reseller of long-distance service since at least 1998.¹⁷ Between 1998 through 2002, BOI had interstate and international revenues that it estimates to have varied between \$1,016, 795 and \$2,727,182, annually.¹⁸ BOI therefore should have filed its first Worksheet no later than March 31, 1999, to account for the interstate and international revenues obtained in calendar year 1998. By its own admission, BOI did not file any Worksheet until September 2003.¹⁹ BOI has repeatedly violated § 54.711 of the Commission's rules by failing to file required Worksheets between March 31, 1999 and September 2003. Accordingly, issue (i) is resolved against BOI.

CONCLUSION

23. BOI filed no opposing affidavits or other reliable factual materials to refute the documentary proof underlying the Bureau's Motion for Partial Summary Decision on three non-dispositive issues. BOI has thereby failed to raise genuine issues of substantial material fact. Thus, there is no genuine issue preventing summary determination of violations of the Communications Act 47 U.S.C. § 214, 47 U.S.C. § 258, and related Commission Rules 47 C.F.R. §§ 63.71, 63.505, 64.1100-1190, 64.1195, as alleged. Issues (g), (h), and (i) are resolved in this ruling against BOI, with sanctions of revocation, cease and desist, and/or any forfeiture to await testimonial evidence, cross-examination, and possible demeanor findings.²⁰

¹⁷ See Transcript of July 14, 2003 Deposition of Kurtis Kintzel, pp. 10-11 (Attachment 1); Letter from Shannon Dennie, Director of Corporate Affairs, BOI, dated December 9, 2002, to Peter Wolfe, FCC ("Dennie Letter") at p. 5 (Policy Letter) (Attachment 2); Business Options, Inc.'s Answers to the Enforcement Bureau's Fourth Set of Interrogatories filed November 21, 2003, at pp. 3-4, Response 5 ("BOI's Fourth Interrogatory Answers") (Attachment 3); BOI Worksheets (Attachment 4). On December 8, 2003, in response to a Motion to Compel, BOI filed answers to the Fourth Set of Interrogatories which should be inserted at Attachment 3.

¹⁸ *Id.*

¹⁹ Business Options, Inc.'s Answers to the Enforcement Bureau's Third Set of Interrogatories, dated October 14, 2003, filed October 20, 2003, at p. 5, Response 6 ("BOI's Third Interrogatory Answers") (Attachment 5).

²⁰ In its discretion as the party carrying the burden of proof, the Bureau counsel should mark, identify, and offer into evidence at the hearing documents submitted with its Motion for Partial Summary Decision as hearing evidence. Such properly identified evidence will be available as evidence for questioning witnesses, and will provide a complete hearing record for post-hearing proposed findings of fact and conclusions of law and initial decision. 47 C.F.R. §§ 1.263, 264, 267.

ORDER

Accordingly, IT IS ORDERED that the Enforcement Bureau's unopposed Motion for Partial Summary Decision filed on December 2, 2003, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION²¹

A handwritten signature in black ink, appearing to read "Richard L. Sippel", is written over the printed name.

Richard L. Sippel
Chief Administrative Law Judge

²¹ Courtesy copies of this *Memorandum Opinion and Order* were sent to counsel for the parties by fax or e-mail on the day of its release.